- Civil Procedure: Removal: Postremoval Procedures
- ♣On a motion to remand, the question before the court is its authority to hear a case pursuant to the removal statute. Whether removal was proper is determined from the record as a whole. The party seeking removal, and not the party moving to remand, has the burden of establishing that the court has jurisdiction. If the district court finds that it has no jurisdiction, the district court must remand the case to state court.
- Civil Procedure: Removal: Basis for Removal
- ★The removal statute, 28 U.S.C.S. § 1441(b), provides that any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties, or laws of the United States shall be removable without regard to the citizenship or residence of the parties.
- Civil Procedure: Removal: Basis for Removal
- ★ Federal district courts are courts of limited subject matter jurisdiction. In general, a civil action brought in state court may be removed to federal court only if it could have been originally brought in federal court. 28 U.S.C.S. § 1441. The federal courts have jurisdiction either when the parties to the lawsuit are of diverse citizenship or when the case involves a federal question. 28 U.S.C.S. §§ 1331, 1332.
- Civil Procedure: lurisdiction..: Diversity Jurisdiction: Citizenship
- For purposes of diversity citizenship, the citizenship of all a limited partnership's partners must be considered.
- © Civil Procedure: Jurisdiction: Subject-Matter Jurisdiction: Federal Question lurisdiction & The federal question statute, 28 U.S.C.S. § 1331, provides that the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.
- Civil Procedure: Removal: Removal Procedures
- ★When deciding whether a case warrants removal because a federal question is involved, a federal court must principally determine if the federal question appears on the face of plaintiff's complaint. A defendant cannot create a federal question by asserting an issue of federal law in a pleading or in a petition for removal. On the other hand, removal is proper if the plaintiff has attempted to avoid a federal forum by drafting an essentially federal claim in terms of state law. To provide grounds for removal, the federal question must be a key element of the plaintiff's complaint.
- Civil Procedure: <u>lurisdiction</u>: <u>Subject Matter Jurisdiction</u>: <u>Federal Question Jurisdiction</u>
 & A federal question does not appear on the face of the plaintiffs complaint when a defense of federal preemption is raised. Therefore, a preemption defense does not authorize removal of a case to federal court, Under an exception to this general rule, removal is proper when Congress has completely preempted an area of state law. When the complete preemption exception applies, the plaintiffs state-law claim is recharacterized as a federal claim. Whether a cause of action has been completely preempted depends on the intent of Congress.
- ☐ Civil Procedure: Jurisdiction: Subject Matter Jurisdiction: Federal Question Jurisdiction

 ★ A defendant cannot create a federal question by asserting an issue of federal law in a pleading or in a petition for removal.
- ☐ Civil Procedure: Jurisdiction: Subject Matter Jurisdiction: Federal Question Jurisdiction

 To determine whether the complete preemption exception applies requires an inquiry into Congress' intent in enacting a statute.

- 🖺 Communications Law: Federal Acts: Communications Act
- +The savings clause, 47 U.S.C.S. § 414, provides that nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute. but the provisions of this chapter are in addition to such remedies. Section 414 preserves state court claims for breaches of duties that are distinguishable from duties created by the Communications Act, such as breach of contract claims.
- Communications Law: Federal Acts: Communications Act
- ★A claim under the Illinois Consumer Fraud and Deceptive Business Practices Act is preserved by § 414 of the Communications Act.
- Communications Law: Federal Acts: Communications Act
- **★**Section 201(b) of the Communications Act, 47 U.S.C.S. § 201(b), states that all charges, practices, classifications and regulations for an in connection with such communication service shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful.
- Communications Law: Federal Acts: Communications Act
- **★**Section 207 of the Communications Act, 47 U.S.C.S. § 207, states that any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the commission, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, any district court of the United States of competent jurisdiction; however, such person shall not have the right to pursue both such remedies.
- Communications Law: Federal Acts: Communications Act
- **素** Section 414 of the Communications Act (Act) indicates Congress' desire to preempt only those claims which interfere with the congressional objective, embodied in the Act, of providing a national communication system with adequate facilities at reasonable charges. However, under Illinois law, § 414 does not preempt state-law claims for breach of contract and fraud that are not contrary to the Communication Act's objectives. Section 414 should be construed as preserving state law causes of action for breaches of duties distinguishable from those created under the Act. State law remedies which do not interfere with the federal government's authority over interstate telephone charges or services, and which do not otherwise conflict with an express provision of the Act, are preserved by § 414. Claims involving the quality of a communications company's service or the reasonableness and lawfulness of its rates are preempted, while actions relating to breaches distinguishable from the Act, such as false advertising and breach of contract, can be pursued under state or federal law.
- Civil Procedure: Jurisdiction: Subject Matter Jurisdiction: Federal Question Jurisdiction Description Communications Law: Federal Acts: Communications—Act
- The need for a nationwide system of rapid, efficient communication does not alone justify a federal court's determination of exclusive jurisdiction.
- Civil Procedure: Jurisdiction: Subject Matter Jurisdiction: Federal Question Jurisdiction
- Civil Procedure: Removal: Basis for Removal
 Communications Law: Federal Acts: Communications Act
- **素** Although jurisdiction for a suit under § 202 of the Communications Act (Act) is arguably contemplated by § 207 of the Act, there is no language in the statute or its legislative history to support the proposition that Congress has clearly manifested an intent to make such causes of action removable to federal court.

- Communications Law: Federal Acts: Communications Act
- **★**Section 202(a) of the Communications Act, 47 <u>U.S.C.S. § 202(a)</u>, prohibits a common carrier from practicing unjust or unreasonable discrimination in practices or services.
- Civil Procedure: Removal: Postremoval Procedures
- Civil Procedure: Costs & Attorney Fees: Attorney Fees
- ★28 U.S.C.S. § 1447(c) provides that an order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.

JUDGES: [**1] ALESIA

OPINIONBY: JAMES H. ALESIA

OPINION: [*853] MEMORANDUM OPINION AND ORDER

Now before the court is plaintiffs motion to remand this action to state court, pursuant to <u>28 U.S.C. § 1447(c)</u>. Plaintiff filed its two-count complaint in state court seeking relief based on Illinois law. Defendant removed the action to this court claiming that federal law preempts plaintiffs state-law claims. For the reasons set forth below, we hold that defendant's removal was improper because this court lacks subject matter jurisdiction. Plaintiffs motion to remand is granted.

■FACTS

Plaintiff American Inmate Phone Systems, Inc. ("AIPS") filed a two count complaint in the Circuit Court of Cook County against defendant US Sprint Communications Company Limited Partnership ("Sprint"). AIPS provides pay phone services to prisons and Sprint provides long distance phone service throughout the U.S.

In Count I of its complaint, AIPS alleges that Sprint entered into a verbal agreement to provide long distance service to AIPS and breached that agreement. The terms of the alleged agreement included: Sprint would waive all phone card surcharges to AIPS; Sprint would provide AIPS with forward discounting; Sprint [**2] would introduce procedures to reduce the number of fraudulent [*854] phone calls; and Sprint would provide a written agreement including these terms. (Complaint, at 1-3) In Count II, AIPS alleges Sprint violated the Illinois Consumer Fraud and Deceptive Business Practices Act, III. Rev. Stat. ch. 121-1/2, paras. 261 et. seq. (Complaint, at 3-5)

Sprint answered the complaint and filed a counter-claim alleging that AIPS entered into a written contract for tariffed phone service and subsequently breached that contract by failing to pay for the service provided. Sprint filed a petition to remove the action to the United States District Court for the Northern District of Illinois pursuant to 28 U.S.C. § 1446(b). Sprint asserted that the federal court had original jurisdiction over the case under the Communications Act, 47 U.S.C. §§ 151 et. seq., pursuant to 28 U.S.C. § 1331.

AIPS has now moved to remand this action to the Circuit Court of Cook County and attorney's fees and costs as a result of wrongful removal pursuant to 28 U.S.C. 1447(c).

11. DISCUSSION

A. Standard of Review

*On a motion to remand, the question before the court is its authority to hear [**3] a case
pursuant to the removal statute. n1 Commonwealth Edison Co. v. Westinghouse Elec. Co.,
759 F.Sudd. 449, 451 (N.D. III. 1991). Whether removal was proper is determined from the
record as a whole. Kennedy v. Commercial Carriers, Inc., 739 F. Supp. 406,409 (N.D. III.
1990). The party seeking removal, and not the party moving to remand, has the burden of
establishing that the court has jurisdiction. Commonwealth Edison, 759 F. Supp. at 452. If
the district court finds that it has no jurisdiction, the district court must remand the case to
state court. Commonwealth Edison, 759 F. Supp. at 452.

n1 The removal statute provides:

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties, or laws of the United States shall be removable without regard to the citizenship or residence of the parties. . . .

28.<u>U.S.C. § 1441(b)</u>.

B. Subject [**4] Matter Jurisdiction

Federal district courts are courts of limited subject matter jurisdiction. In general, a civil action brought in state court may be removed to federal court only if it could have been originally brought in federal court. 28 U.S.C. § 1441. The federal courts have jurisdiction either when the parties to the lawsuit are of diverse citizenship or when the case involves a federal question. 28 U.S.C. §§ 1331, 1332. Sprint has not based its removal on diversity jurisdiction. n2 Therefore, the jurisdiction necessary for removal of this case must be based on a question of federal law. The appropriate inquiry is whether the AIPS' state-law claim arises under federal law. n3 Boyle v. MTV Networks, Inc., 766 F. Supp. 809. 812-13 (N.D. Cal. 1991).

n2 Neither AIPS or Sprint has discussed the question of diversity jurisdiction. 28 U.S.C. § 1332. If AIPS and Sprint are of diverse citizenship and the amount in controversy exceeds \$ 50,000, this court might well have jurisdiction over this suit independent of federal question jurisdiction. AIPS is an Illinois corporation. Complaint, at 1. Sprint is said to be Delaware-based limited partnership. This, however does not settle the question of diversity of citizenship. For purposes of diversity citizenship, the citizenship of all a limited partnership's partners must be considered. *Carden v. Arkoma Assoc.*, 494 U.S. 185, 110 S. Ct. 1015, 1017-22, 108 L. Ed. 2d 157 (1990); Market *Street Assoc. Ltd. Partnership v. Frey*, 941 F.2d 588, 589 (7th Cir. 1991). In any event, Sprint has not pleaded diversity jurisdiction in its petition for removal and, therefore, we do not consider whether we have diversity jurisdiction. [**5]

n3 *The federal question statute provides:

The district courts shall have original jurisdiction of all civil actions arising under

the Constitution, laws, or treaties of the United States.

When deciding whether a case warrants removal because a federal question is involved, a federal court must principally determine if the federal question appears on the face of plaintiff's complaint. *Illinois v. Kerr-McGee Chemical Corp.*, 677 F.2d 571, 575 (7th Cir.), cert. denied, 459 U.S. 1049, 74 L. Ed. 2d 618, 103 S. Ct. 469 (1982). A defendant cannot create a federal [*855] question by asserting an issue of federal law in a pleading or in a petition for removal. *Kerr-McGee*, 677 F.2d at 575. On the other hand, removal is proper if the plaintiff has attempted to avoid a federal forum by drafting an essentially federal claim in terms of state law. *Kerr-McGee*, 677 F.2d at 575. To provide grounds for removal the federal question must be a key element of the plaintiff's complaint. *Kerr-McGee*, 677 F.2d at 575.

A [*6] federal question does not appear on the face of the plaintiff's complaint when a defense of federal preemption is raised. Lister v. Stark, 890 F.2d 94 1, 943 (7th Cir. 1989), cert. denied, 112 L. Ed. 2d 584, 111 S. Ct. 579 (1990). Therefore, a preemption defense does not authorize removal of a case to federal court. Lister, 890 F.2d at 943. The Supreme Court, however, has created an exception to this rule. Lister, 890 F.2d at 943 (citing Metropolitan Life Ins. Co. v. Taylor, 48 1 U.S. 58, 66, 95 L. Ed. 2d 55, 107 S. Ct. 1542 (1987)). Under this exception, removal is proper when Congress has completely preempted an area of state law. When the complete preemption exception applies, the plaintiffs state-law claim is recharacterized as a federal claim. Lister, 890 F.2d at 943. Whether a cause of action has been completely preempted depends on the intent of Congress. Lister, 890 F.2d at 943.

Two inquiries are necessary to resolve the jurisdictional question of this case. Lister. 890 F.2d at 944. The first inquiry is whether a federal question appears on the face of plaintiffs [**7] complaint. If so, then the removal was proper. If no federal question appears on the complaint, the second inquiry is whether removal is proper under the complete preemption exception. Lister, 890 F.2d at 944.

In this case, AIPS' complaint does not allege a federal claim and federal law has not completely preempted state law in this area. As a result, this court does not have subject matter jurisdiction and must remand the matter to state court.

1. AIPS' Complaint

In the present case, Count Iof AIPS' complaint alleges breach of a verbal contract entered into on or about March 12, 1990. Count II alleges violation of the Illinois Consumer Fraud and Deceptive Business Practices Act. Sprint argues, however, that AIPS' complaint alleges a breach of a written contract for long distance service entered into by the parties on May 15, 1990. Sprint contends that a tariff is incorporated into this contract and, as a result, AIPS is alleging a breach of a tariff.

In fact, AIPS' complaint alleges breach of a verbal contract. Neither count alleges a violation of the Communications Act or any other federal law or of Sprint's tariff. A defendant cannot create [**8] a federal question by asserting an issue of federal law in a pleading or in a petition for removal. Kerr-McGee, 677 F.2d at 575. Therefore, no federal cause of action appears on the face of AIPS' complaint. As a result, the second inquiry is whether removal is proper under the complete preemption exception.

2. Preemption

*To determine whether the complete preemption exception applies requires an inquiry into Congress' intent in enacting a statute. *Lister*, 890 F.2d at 943. A few courts have addressed preemption in the context of the Communications Act. In Ivy *Broadcasting Co. v. American* Teleohone & Telegraoh Co., 391 F.2d 486 (2d Cir. 1968), the Second Circuit Court of Appeals found that the Communications Act completely preempted state common law actions against a telephone carrier for negligence or breach of contract. Ivy involved claims against AT & T for negligence and breach of contract. The court held that issues of duties, charges, and liabilities of telephone companies with respect to interstate communications service were to be governed solely by federal law. Ivy, 391 F.2d at 491. [**9] The court found that the states were precluded from acting in this area. The Ivy court considered various provisions of the Communications Act and found a congressional purpose of uniformity and equality of rates and service. *Ivy*, 391 F.2d at 491. [**856] According to the Ivy court, this purpose could be achieved only by the application of uniform federal law.

The court declines to follow Ivy for a number of reasons. First, the Ivy court did not address the "savings clause" of the Communications Act. The savings clause provides:

Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

47 <u>U.S.C.</u> § 414. Since *Ivy*, other courts have addressed the remedies Congress had in mind when enacting § 414. See *Comtronics*, *Inc. v. Puerto Rico Tel. Co.*, 553 F.2d 701 (1st Cir. 1977). The *Comtronics*, court interpreted § 414 as preserving state court claims for breaches of duties which are distinguishable from duties created by the Communications Act, such as breach of contract claims. *Comtronics*, 553 F.2d at 708, n.6. [**10] Other courts have approved state-law claims for fraud and deceit as well. See *In Re Long* Distance Telecommunications *Litigation*, 831 F.2d 627, 633 (6th Cir. 1987). n4

n4 The *In* re Long Distance Telecommunications Litigation court compared § 414 to an identical savings clause contained in the Aviation Act, 49 U.S.C. § 1506. The court noted that the Supreme Court, in *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 48 L. Ed. 2d 643, 96 S. Ct. 1978 (1976), which involved a common law action for misrepresentation, held the Aviation Act savings clause as not "absolutely inconsistent" with the common law action. *In* re *Long* Distance Litigation, 831 F.2d at 634 (quoting *Nader*, 426 U.S. at 300).

A single court in this district has considered this question. In <u>Bruss Co. v. Allnet</u>
Communication Services, <u>Inc., 606</u> F. Supp. 401, 411 (N.D. III. 1985), Judge Nordberg determined that a complaint which alleged violations of the Illinois Consumer Fraud [**11] and Deceptive Business Practices Act and the Illinois Deceptive Trade Practices Act, was saved from preemption by § 414. In <u>Bruss</u>, the plaintiffs, former subscribers to the defendants' long-distance service, brought state-law claims for common law fraud and violations of the Illinois Consumer Fraud and Deceptive Business Practices Act and the Illinois Deceptive Trade Practices Act. Defendants moved to dismiss, arguing that the Communications Act preempted the state-law claims. <u>Bruss</u>, 606 F. Supp. at 409. The court applied § 414 to preserve the state-law actions, reasoning that the duties owed by

defendants under these causes of action were distinct from the duties created by the Communications Act. *Bruss*, 606 F. Supp. at 411, Moreover, the court reasoned that the state-law causes of action prohibited different conduct from that prohibited by the Communications Act. *Bruss*, 606 F. Supp. at 411. In addition, the causes of action did not conflict with the provisions of the Communications Act or interfere with Congress' regulatory scheme. *Bruss*, 606 F. Supp. at 411.

AIPS, like the plaintiff in [**12] Bruss, is alleging Sprint violated the Illinois Consumer Fraud and Deceptive Business Practices Act. In addition, AIPS alleges that the Sprint breached a verbal contract. We agree with the Bruss court that a claim under the Illinois Consumer Fraud and Deceptive Business Practices Act is preserved by § 414 of the Communications Act. In addition, we are persuaded by the Bruss court's reasoning to conclude that the duties created by the verbal contract are distinct from the duties created the Communications Act. We also find that the contract claim neither conflicts with the provisions of the Communications Act nor interfere with the regulatory scheme of the Act. The alleged verbal contract between AIPS and Sprint set up a business relationship whereby Sprint would sell long distance service under certain terms and that AIPS would buy the long distance service under the terms stated.

Sprint argues that the terms of the alleged contract, that Sprint would waive certain telephone surcharges, would provide forward pricing discounts and would protect AIPS from fraudulent telephone calls raise an issue of whether Sprint's charges are "fair and reasonable". Memorandum [**13] of Law in Support of Defendant's Petition for Removal, at 3. If this were true, then AIPS' suit would be specifically preempted [*857] by the Communications Act. 47 U.S.C. §§ 201(b), 207. n5 However, the duty set forth in § 201(b) requiring "just and reasonable" practices is different than the duty allegedly breached by Sprint. AIPS is not alleging that Sprint's verbal promises were not just and reasonable. AIPS is alleging that Sprint made the promises to provide forward discounting, to waive certain surcharges and to protect AIPS from fraudulent charges and then did not fulfill these promises. AIPS is not alleging Sprint breached its statutory duty to act in a just and reasonable manner. Rather, AIPS is alleging Sprint failed to abide by a verbal contract the parties allegedly entered into, a contract imposing duties different than those found in the Communications Act.

n5 **\F**Section 201(b) states:

All charges, practices, classifications and regulations for an in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful. . . . •

Section 207 states:

Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission . . ., or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, any district court of the United States of competent jurisdiction; but such person shall not have the right to

pursue both such remedies.

While not controlling on **us** here, we note that the Illinois Supreme Court, in a case involving facts similar to *Bruss*, reached the same conclusion as that of the *Bruss* court. See <u>Kellerman v. MCI</u> Telecommunications <u>Corp.</u>, 112 Ill. 2d 428, 493 N.E.2d 1045, 98 Ill. Dec. 24 (Ill.), cert. denied, 479 U.S. 949. 93 L. Ed. 2d 384, 107 S. Ct. 434 (1986). In Kellerman, plaintiffs, who were subscribers to the defendant's long-distance service, brought action under the Illinois Consumer Fraud and Deceptive Practices Act and the Illinois Uniform Deceptive Trade Practices Act. The Kellerman plaintiffs charged that the defendant's advertising practices constituted breach of contract and common law fraud. <u>Kellerman. 493 N.E.2d at 1045</u>. The court found that \$\frac{1}{4}\$\frac{1}{2}\$ 414 indicated Congress' desire to preempt only those claims which interfered with the congressional objective, embodied in the Communication Act, of providing a national communication system with adequate facilities at reasonable charges. However, the Illinois Supreme Court concluded \(\frac{1}{2}\$ 414 would not preempt state-law claims for breach of contract and fraud which were not contrary to the Act's objectives.

It is reasonable [**15] to presume that State laws which interfere with Congress' objective of creating "a rapid, efficient, Nation-wide, * * * * communication service with adequate facilities at reasonable charges" (47 U.S.C. sec. 151(1982)), such as State attempts to regulate interstate carriers' charges or services, would be preempted by the Act. (See, e.g. Komatz Construction. Inc. v. Western Union Telegraph Co. (1971), 290 Minn. 129, 186 N.W.2d 691 (action against telegraph company for damagers caused by delay in transmission of telegram is governed by Federal law).) However, we believe that section 414, when considered in the context of the entire act, should be construed as preserving State-law "causes of action for breaches of duties distinguishable from those created under the Act. . . ." State law remedies which do not interferer with the Federal government's authority over interstate telephone charges or services, and which do not otherwise conflict with an express provision of the Act, are preserved by section 414.

Kellerman, 493 N.E.2d at 1051 (ellipses original; some citations omitted). According to the court, claims involving the quality [**16] of the defendant's service or the reasonableness and lawfulness of its rates would be preempted, while actions relating to breaches distinguishable from the Act, in Kellerman, false advertising and breach of contract, could be pursued under state or federal law. *Kellerman*, 493 N.E. 2d at 1051-52.

AIPS' complaint does not allege that Sprint's charges are unreasonable or unfair. [*858] AIPS does not attack the quality of Sprint's services. AIPS seeks to demonstrate the existence of a verbal contract and to hold Sprint to the terms of the contract. Alternatively, AIPS seeks to recover for Sprint's alleged misrepresentation. Despite Sprint's status as a common carrier controlled in large measure by statute, Sprint is still held to the same duties as normal business entities when entering into contracts or when making business representations. The need for a nationwide system of rapid, efficient communication does not alone justify a federal court's determination of exclusive jurisdiction. Nordlicht v. New York Tel. Co., 799 F.2d 859, 864-65 (2d Cir. 1986), cert. denied, 479 U.S. 1055, 93 L. Ed. 2d 981, 107 S. Ct. 929 (1987); Kellerman, 493 N.E.2d at 1052, [**17] Accordingly, AIPS' state-law contract claim is preserved by § 414.

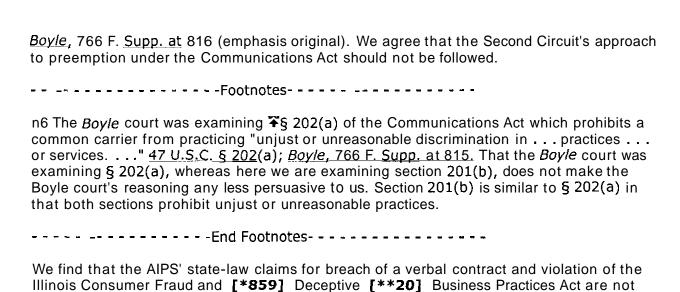
The second reason the court declines to follow Ivy is because the analysis in Ivy predates relevant Supreme Court preemption analysis. The court in Boyle v. MTV Networks, Inc. analyzed the complete preemption exception in connection with the Communications Act. Boyle, 766 F. Supp. at 809. In Boyle, the district court held that plaintiff's claim under California's deceptive business practice act was not preempted by the Communications Act. n6 The court determined that the Supreme Court has found complete preemption only in limited circumstances. Boyle, 766 F. Supp. at 815 (primarily in cases raising claims preempted by § 301 of the Labor Management Relations Act). More importantly, in analyzing the complete preemption doctrine, the court noted that the Second Circuit's approach to preemption under the Communications Act, see Nordlicht, 799 F.2d at 864-65, following Ivy Broadcasting Co. v. AT&T, 391 F.2d 486 (2d Cir. 1968), predated the Supreme Court's complete preemption analysis in Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 95 L. Ed. 2d 55, 107 S. Ct. 1542 (1987) [**18] and Caterpillar, Inc. v. Williams, 482 U.S. 386, 96 L. Ed. 2d 318, 107 S. Ct. 2425 (1987). Boyle, 766 F. Supp. at 816, The Boyle court stated:

*Although jurisdiction for a suit under [Communications Act] section 202 is arguably contemplated by section 207, Defendants have not pointed to and the Court is not aware of any language in the statute or its legislative history to support the proposition that Congress has clearly manifested an intent to make such causes of action removable to federal court.

* * *

preempted by federal law.

Defendants cite two Second Circuit cases for the proposition that Plaintiffs state law cause of action is pre-empted by the [Communications Act]. These cases, however, were decided before Metropolitan Life and Caterpillar. Additionally, Nordlicht v. New York Tel. Co., 799 F.2d 859, 862-63 (2d Cir. 1986), held that federal common law, rather than section 207 of the [Communications Act], pre-empted the state law causes of action for fraud and for money had and received. In Nordlicht, the Second Circuit did not discuss the Supreme Court's "complete pre-emption" analysis, but instead followed its prior decision in Ivy Broadcasting Co. v AT & T, 391 F.2d at 486, 489-91 (2d Cir. 1968). [**19] To the extent that the Second Circuit cases are inconsistent with the Supreme Court's analysis of "complete pre-emption," this Court respectfully declines to follow them.



C. Costs and Attorney's Fees

AIPS has requested payment of costs and attorney's fees as a result of improper removal of this case. Title 28, section 1447(c) of the United States Code provides that an "order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." The present case involves complex issues and Sprint has presented a substantial jurisdictional question. Boyle, 766 F. Supp. at 817; Turner v. Bell Federal Savings and Loan Association, 490 F. Supp. 104, 105 (N.D. III. 1980). There is no indication that Sprint acted in bad faith. Whitestone Savings and Loan Ass'n v. Romano, 484 F. Supp. 1324, 1327 (E.D. N.Y. 1980).

AIPS is not entitled to costs and expenses incurred in responding to Sprint's petition for removal.

111. CONCLUSION

The court lacks federal question subject matter jurisdiction because AIPS' complaint does not state a federal claim and AIPS' state-law claim is not preempted by the Communications Act. AIPS' motion to remand this matter to [**21] the state court is GRANTED. AIPS is not entitled to attorney's costs and expenses incurred in responding to Sprint's motion. AIPS' requests for costs and attorney's fees is DENIED. This matter is REMANDED to the Circuit Court of Cook County, Illinois, County Department, Chancery Division.

Date: March 31, 1992

JAMES H. ALESIA

United States District Judge

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165 F.R.D. 431, *, 1996 U.S. Dist. LEXIS 4661, **

MARVIN WEINBERG, on behalf of Himself and all others similarly situated, Plaintiffs, v. RECENED & INSPECTED

AUG 0 9 2002

ECC. MAIL ROOM SPRINT CORPORATION, Defendant.

UNITED STATES DISCIPLICATED ON INTO FORE 354E (ANSWRICT OF NEW JER) 165 F.R.D. 431; 1996 U.S. Dist. LEXIS 4661

> April 9, 1996, ORDERED April 10, 1996, ORIGINAL FILED

SUBSEQUENT HISTORY: [**1] The Publication Status of this Document has been Changed by the Court from Unpublished to Published May 8, 1996.

DISPOSITION: The Court finds this case to be lacking federal jurisdiction and, therefore, grants plaintiff Weinberg's motion to remand. The Court also denies as moot Sprint's motion to stay.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff consumer sought recovery from defendant longdistance telephone service provider for utilizing deceptive and misleading advertising and promotional practices, fraud, negligent misrepresentation, and violation of New Jersey's Consumer Fraud Act, N.J. Stat. Ann. §§56:8-1 et seq. Long-distance provider removed to federal court. Consumer sought remand to the New Jersey Superior Court and longdistance provider opposed the motion.

OVERVIEW: Consumer argued that there was no jurisdiction while long-distance provider argued that jurisdiction could be based on a federal question under 28 U.S.C.S. § 1331 or diversity of citizenship under 28 U.S.C.S. § 1332. The court held that under the well-pleaded complaint rule, a federal question existed only when a federal issue appeared on the face of the complaint. The court held that there was no federal question jurisdiction because consumer's claims were based solely on New Jersey law, longdistance provider's preemption defense could not provide a basis for removal, and federal law did not preempt consumer's state claims. The court also held that there was no diversity of citizenship jurisdiction, which required long-distance provider to show that the amount of controversy requirement was met for each class member. The court found that the amount of recoverable damages could not reach \$ 50,000 for any member and that the class claims should not be aggregated because the members did not have a common and undivided interest in the award. The court also held that long-distance provider's cost of complying with an injunction could be used to determine the amount in controversy.

OUTCOME: The court granted consumer's motion to remand the case to state court.

CORE TERMS: federal law, state law, federal jurisdiction, Communications Act, removal, punitive damages, amount in controversy, putative, jurisdictional amount, preemption, preempt, billing, federal question, customer, well-pleaded, distance, carrier, minute, subject matter jurisdiction, diversity of citizenship, class action, preempted, actual conflict, savings

clause, compensatory damages, failure to disclose, removing, causes of action, treble damages, federal statute

CORE CONCEPTS - + Hide Concepts

- Civil Procedure: Removal: Basis for Removal
- The general federal removal statute permits a defendant in a state court action to remove the suit to federal district court if federal subject matter jurisdiction existed when the complaint was initially filed. 28 U.S.C.S. § 1441(a). The removing defendant must establish that federal jurisdiction exists and that removal is proper. Following removal, the district court may remand the action back to state court if at any time before final judgment it appears that it lacks subject matter jurisdiction. 28 U.S.C.S. § 1447(c).
- Civil Procedure: Removal: Removal Procedures
- When presented with the plaintiffs argument that the court lacks federal subject matter jurisdiction over the matter and remand to state court is sought, the removing defendant must shoulder the burden of establishing the validity of the removal and the existence of federal jurisdiction.
- Civil Procedure: Jurisdiction: Subject Matter Iurisdiction: Federal Question Jurisdiction
 Civil Procedure: Removal: Basis-for Removal
- The well-pleaded complaint rule requires the existence of federal question on the face of the plaintiff's complaint in order for the case to be removable under 28 U.S.C.S. § 1441. Based on the premise that the plaintiff is the aster of the complaint, the rule provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiffs properly pleaded complaint. Thus, jurisdiction may not be sustained on a theory that the plaintiff has not advanced, and a plaintiff may avoid federal jurisdiction by exclusive reliance on state law.
- ☐ Civil Procedure: State & Federal Interrelationships: Federal Common Law

 Absent an express congressional statement, the U.S. Supreme Court recognizes two
- Absent an express congressional statement, the U.S. Supreme Court recognizes two varieties of federal preemption. First, state law is preempted to the extent it actually conflicts with federal law, that is, when compliance with both state and federal law is Impossible. Second, complete preemption applies when federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it.
- Civil Procedure: Removal: Basis-for Removal
- A case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue.
- © Civil Procedure: Jurisdiction: Subject Matter Jurisdiction: Federal Question lurisdiction

- civil Procedure: State & Federal Interrelationships: Federal Common Law
- +Complete preemption is a doctrine crafted by the Supreme Court as an independent corollary to the well-pleaded complaint rule. The doctrine provides that in some cases, Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character. However, to invoke the doctrine, the pre-emptive force of a statute must be so extraordinary that it converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.
- © Communications Law: Federal Acts: Communications Act

 See 47 U.S.C.S. § 201(b).
- Communications Law: Federal Acts: Communications Act
 See 47 U.S.C.S. § 202(a).
- © Communications Law: Federal Acts: Communications Act

 See 47 U.S.C.S. § 203(a).
- Civil Procedure: Removal: Basis for Removal
- Civil Procedure: State & Federal Interrelationships: Federal Common Law
- There is a two-pronged test to determine whether a removed state law action fails within the limited area of complete federal preemption. District courts should first address whether the allegedly preemptive statute contains civil enforcement provisions under which the plaintiff's state claims could be brought. If the federal statute provides no provision for adjudication of the right plaintiff seeks to enforce, then no claim arises under federal law, and removal was improper. The second prong of the inquiry examines whether the federal statute contains a clear congressional intention to permit removal of state claims despite the plaintiffs exclusive reliance on state law. Absent an affirmative indication of Congress' intent to permit removal, complete preemption does not apply, and the district court need not and should not address the issue of whether the state substantive law relied upon by the plaintiff has been preempted by federal law.
- © Communications Law: Federal Acts: Communications Act

 See 47 U.S.C.S. § 207.
- Communications Law: Federal Acts: Communications Act See 47 U.S.C.S. § 414.
- Civil Procedure: Jurisdiction: Diversity Jurisdiction: Amount in Controversy
 Civil Procedure: Jurisdiction: Diversity Jurisdiction: Citizenship
- ★Subject matter jurisdiction based upon diversity of citizenship is proper only in civil actions between citizens of different states where the amount in controversy exceeds the sum or value of \$ 50,000.00, exclusive of interest and costs. 28 U.S.C.S. § 1332

- (a). Section 1332 requires complete diversity of citizenship between all plaintiffs and all defendants. In a class action, however, citizenship need only be diverse between the named class representatives and the defendants.
- Civil Procedure: Jurisdiction: Diversity Jurisdiction: Amount in Controversy Civil Procedure: Class Actions: Prerequisites
- ♣ Despite the absence of certification as a class action, class action principles are applied in determining the amount in controversy for removal of an action to the federal court because the United States Court of Appeals for the Third Circuit holds that a suit should be treated as such for purposes of determining federal jurisdiction whether or not the class has been certified.
- Civil Procedure: Jurisdiction: Diversity Jurisdiction: Amount in .Controversy Civil Procedure: Removal: Basis for Removal
- ★In a case involving removal, the removing defendant bears the burden of demonstrating that the statutory requirements of diversity jurisdiction have been met. The removal statute should be applied stringently, and all doubts should be resolved in favor of remand. It is well settled that each plaintiff in a class action must independently satisfy the statutory amount in controversy requirement. In the case of a removing defendant asserting federal jurisdiction, the United States Court of Appeals for the Third Circuit places great confidence in the allegations of the plaintiffs complaint because of the presumption that the plaintiff has not claimed an excessive amount in order to obtain federal jurisdiction.
- Eivil Procedure: Jurisdiction: Diversity Jurisdiction: Amount in Controversy

 ★ When determining whether the jurisdictional amount has been satisfied in a case seeking an unspecified amount of damages, including compensatory damages in an amount to be determined at trial, the district court must make an independent inquiry into the value of the claims alleged in order to determine whether plaintiffs complaint states a claim that meets the jurisdictional amount. This inquiry should be guided by a reasonable reading of the value of the rights being litigated.
- ☑ Civil Procedure: Jurisdiction: Diversity Jurisdiction: Amount in Controversy

 Lawrence When a plaintiff seeks recovery of both actual and punitive damages and such damages are legally recoverable, courts may take into account the claim for punitive damages when determining whether the jurisdictional amount has been satisfied. However, courts must scrutinize carefully a claim in which a request for punitive damages comprises the majority of the jurisdictional amount for exorbitant punitive damages should not be cause for the transformation of a state action into a federal one.
- Antitrust & Trade Law: Consumer Protection: Deceptive Sales Practices
 See N.J. Stat. Ann. § 56:8-19.
- ☐ Civil Procedure: Iurisdiction: Diversity Jurisdiction: Amount in Controversy

 When provided for under state law, attorneys' fees must be considered in the determination of the jurisdictional amount in controversy.
- ☐ Civil Procedure: Jurisdiction: Diversity Jurisdiction: Amount in Controversy

 Lit would be illogical to permit the aggregation of punitive damage awards while requiring each class member to independently satisfy the jurisdictional amount with respect to compensatory damages.
- Civil Procedure: Jurisdiction: Diversity Jurisdiction: Amount in Controversy

The common fund exception to the rule that each plaintiff in a class action must independently satisfy the jurisdictional amount requirement applies only if class members sue jointly to enforce a common title or right in which they have a common and undivided interest, not where each plaintiff is injured individually and in a unique amount that must be proved separately.

Civil Procedure: Jurisdiction: Diversity Jurisdiction: Amount in Controversy

Civil Procedure: Injunctions: Elements

★In injunctive actions, amount in controversy is measured by the value of the right sought to be protected by the equitable relief. It is, therefore, the value to plaintiff to conduct his business or personal affairs free from the activity sought to be enjoined that is the yardstick for measuring the amount in controversy. The court will not evaluate plaintiffs' claims from the defendant's perspective.

COUNSEL: For Plaintiffs: Allyn Z. Lite, Esq., Goldstein Till & Lite

For Defendant: Paul J. Dillon, Esq., Greenberg Dauber & Epstein.

JUDGES: Hon. Joel A. Pisano, U.S. Magistrate Judge

OPINIONBY: JOEL A. PISANO

OPINION: [*434] OPINION

JOEL A. PISANO, UNITED STATES MAGISTRATE JUDGE:

Before the Court are two motions: first, defendant Sprint Corporation has moved the Court for a stay pending resolution of its application for assignment of the case by the Judicial Panel for Multidistrict Litigation. Plaintiff Martin Weinberg has opposed this **[*435]** motion and moved the Court to remand the action to the New Jersey Superior Court, Bergen County, the court from which defendant removed the suit. Defendant has opposed this motion, and the Court heard oral argument on March 25, 1996.

BACKGROUND

In his complaint, plaintiff Martin Weinberg ("Weinberg") alleges that defendant Sprint Corporation ("Sprint") utilizes deceptive and misleading advertising and promotional practices in order to lure customers [**2] to use its services. The Complaint alleges that Sprint affirmatively promotes the rate of 10 cents per minute for telephone calls, citing advertisements for the "Sprint Sense" program in which Sprint states that both in-state and out-of-state calls cost 10 cents per minute. Plaintiff claims that the advertisements and promotions do not disclose that Sprint engages in "rounding up," a practice through which Sprint charges more than 10 cents per minute for any call which does not last precisely one minute. When billing customers for long distance telephone service, Sprint allegedly "rounds up" the time charged to the next full minute, thereby raising the rate from the advertised 10 cents to up to 6 dollars per minute.

Plaintiff's Complaint was filed in Bergen County on December 12, 1995 and asserts counts for fraud, negligent misrepresentation, and violation of New Jersey's Consumer Fraud Act, N.J.S.A. 56:8-1 et seq. Sprint removed the action to this Court on January 23, 1996, basing federal jurisdiction on its contention that plaintiff's claims are preempted by and arise under the Federal Communications Act of 1934, 47 U.S.C. § 150 et seq. Sprint then moved the Court for a [**3] stay of proceedings pending consideration by the Judicial Panel for Multidistrict Litigation ("JPML") of its motion to transfer this and three similar actions to the

United States District Court for the Western District of Missouri pursuant to **28** <u>U.S.C.</u> § <u>1407</u>. Plaintiff Weinberg opposes this motion and argues that the Court should remand the action to state court because it lacks federal subject matter jurisdiction over the suit. In opposing Weinberg's motion to remand, Sprint asserts that both federal question and diversity jurisdiction exist, enabling this Court to retain jurisdiction and stay the proceedings pending the JPML's resolution of the transfer.

DISCUSSION

I. MOTION TO REMAND

*The general federal removal statute permits a defendant in a state court action to remove the suit to federal district court if federal subject matter jurisdiction existed when the complaint was initially filed. See 28 U.S.C. § 1441(a). The removing defendant must establish that federal jurisdiction exists and that removal is proper. Boyer v. Snap-on Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990), cert. denied, 498 U.S. 1085, 112 L. Ed. 2d 1046, 111S. Ct. 959 (1991). Following removal, the district court [**4] may remand the action back to state court "if at any time before final judgment it appears that [it] lacks subject matter jurisdiction." 28 U.S.C. § 1447(c).

Plaintiff Weinberg argues that the Court lacks federal subject matter jurisdiction over this matter and therefore seeks remand to state court. When presented with such an argument, the removing defendant must shoulder the burden of establishing the validity of the removal and the existence of federal jurisdiction. Boyer, 913 F.2d at 111. Sprint argues that the Court has subject matter jurisdiction over this action based upon both federal question jurisdiction and diversity of citizenship.

A. Federal Question Jurisdiction

*Federal district courts are courts of limited jurisdiction, and a civil action brought in state court may be removed to federal court only if the plaintiff originally could have filed the complaint in federal court. 28 U.S.C. § 1441. Section 1331 of Title 28 states that district courts "shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. A case "arises under" a federal law when an essential element [**5] of the plaintiff's cause of action depends for its resolution upon the validity, [*436] construction, or effect of federal law. Franchise Tax Board v. Vacation Trust for Southern California, 463 U.S. 1,9-11, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983).

*The well-pleaded complaint rule requires the existence of federal question on the face of the plaintiff's complaint in order for the case to be removable under § 1441. Spellman v. Meridian Bank (Delaware), F.3d . 1995 U.S. ADD. LEXIS 37149, 1995 WL 764548 at *2 (3d Cir. 1995) (citing Gully v. First National Bank, 299 U.S. 109, 112-13, 81 L. Ed. 70, 57 S. Ct. 96 (1936)). Based on the premise that the plaintiff is the aster of the complaint, the rule "provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiffs properly pleaded complaint." Caterpillar, Inc. v. Williams. 482 U.S. 386, 393, 96 L. Ed. 2d 318, 10.7 S. Ct. 2425 (1987). Thus "jurisdiction may not be sustained on a theory that the plaintiff has not advanced," Merrell Dow Pharm. Inc. v. Thompson, 478u.S. 804, 810 n.6, 92 L. Ed. 2d 650, 106 S. Ct. 3229 (1986), and a plaintiff may "avoid federal jurisdiction by exclusive reliance on state law." Spellman, 1995 U.S. ADD. LEXIS 37149, 1995 WL 764548 at *2 (quoting Caterpillar, 482.U.S. at 392).

Applying these principles, [**6] the Court concludes that the plaintiffs case as plead in the Complaint lacks federal jurisdiction. As set forth in the Complaint, plaintiffs claims are based upon New Jersey common law and statutory law, without reference to federal law. These claims relate solely to Sprint's alleged misrepresentations in its promotional advertisements and do not depend on any provision of federal law for their resolution. As such, no federal

question exists on the face of plaintiff's complaint, and the action therefore does not "arise under" federal law.

Weinberg does not argue that the rates Sprint charges deviate from the tariff rates that, under federal law, Sprint must file with the Federal Communications Commission ("FCC"). Instead, plaintiff seeks disclosure of those rates and damages for the alleged failure to disclose their calculation. The resolution of the suit does not depend upon the "reasonableness of Sprint's billing rates," as Sprint argues, but upon the reasonableness of Sprint's business practices in conducting its advertising campaign. Unlike a claim for unpaid long distance charges, this action is not "based upon" nor does it "draw life from" the tariffs that Sprint files with [**7] the FCC. See MCI Telecommunications Corp. v. Teleconcepts, Inc., 71 F.3d 1086, 1096 (3d Cir. 1995).

Further, no issue of federal law must be decided in order to adjudicate Weinberg's suit. That the trial court may find it necessary to refer to Sprint's published billing rates under the Communications Act does not transform the complaint into one presenting a federal question that is essential to recovery. Thus, the Court finds that a straightforward application of the well-pleaded complaint rule precludes a finding of original federal jurisdiction. n I

n I Though it does not make the argument in its opposition to this motion, Sprint based its removal in part upon the artful pleading doctrine, which is an exception to the well-pleaded complaint rule. A plaintiff may not avoid federal jurisdiction by artfully disguising a federal claim as a state cause of action. Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 397 n.2, 69 L. Ed. 2d 103, 101 S. Ct. 2424 (1981). In such a case, removal is proper if the court determines that a plaintiffs failure to plead a federal cause of action was a bad faith attempt to disguise a federal claim as a state claim. The Court, however, finds no evidence to support this theory. Plaintiff's claims are not federal in nature, and Sprint offers no facts to suggest that bad faith played a role in plaintiff's choice of claims. As discussed, no federal question exists on the face of plaintiff's Complaint, and the Court finds no evidence that the artful pleading doctrine should apply to support federal jurisdiction in this case.

Sprint also argues that the federal government's regulation of the communications and long distance industries through the Federal Communications Act preempts Weinberg's state law claims. **Absent an express Congressional statement, the Supreme Court recognizes two varieties of federal preemption. First, state law is preempted "to the extent it actually conflicts with federal law, that is, when compliance with both state and federal law is impossible." California v. ARC America-Corp.. 490 U.S. 93, 100-01, [*437] 104 L. Ed. 2d 86. 109 S. Ct. 1661 (1989). Second, complete preemption applies when federal law so thoroughly occupies a legislative field "'as to make reasonable the inference that Congress left no room for the States to supplement it."' Fidelity Federal Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153, 73 L. Ed. 2d 664, 102 S. Ct. 3014 (1982) (quoting Rice v. Santa Fe Elevator Corp.. 331 U.S. 218, 230, 91 L. Ed. 1447, 67 S. Ct. 1146 (1947)). Sprint bases its arguments for removal on both types of preemption.

Sprint first asserts that an actual conflict between state and federal law requires the preemption of plaintiffs claims in this case. Because its billing practices are permitted by virtue of the tariffs it files with the FCC and by the federal regulations governing [**9] long distance carriers, Sprint argues, the application of state common law and statutory law to this case would present an "impermissible conflict," and, accordingly, federal law must preempt the state causes of action.

Sprint's "actual conflict" preemption argument, however, is presented as a defense to

plaintiffs state law claims, and is therefore insufficient to support removal. Discussing the well-pleaded complaint rule, the Supreme Court has repeatedly stated that, "for better or worse, ...a defendant may not remove a case to federal court unless the plaintiffs complaint establishes that the case 'arises under' federal law." Franchise Tax Bd., 463 U.S. at 10. Further, it is

settled law that *a case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiffs complaint, and even if both parties concede that the federal defense is the only question truly at issue.

Cater <u>pillar. 482 U.S. at 393</u> (emphasis in original). See also <u>Franchise Tax Bd., 463 U.S. at</u> 14; <u>Spellman, 1995 U.S. App. LEXIS 37149, 1995 WL 764548</u> at *2 (3d Cir. 1995). Accordingly, this basis for removal [**10] fails. n2
n2 This of course does not preclude Sprint from raising its "actual conflict" preemption argument as a defense when the substantive claims are tried in the state court. In the event Sprint's arguments are successful and the trial court finds an actual conflict, federal law would apply to the suit.

Sprint also relies upon "Tcomplete preemption," a doctrine crafted by the Supreme Court as an "independent corollary" to the to the well-pleaded complaint rule. The doctrine provides that in some cases, "Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63-64, 95 L. Ed, 2d 55, 107 S. Ct. 1542 (1987). However, to invoke the doctrine, "the pre-emptive force of a statute [must be] so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." Caterpillar, 482 U.S. at 393 (quoting Metropolitan [**11] Life, 481 U.S. at 65).

Sprint argues that Congress has clearly evidenced an intent to exclusively "occupy the field" in cases against telecommunications providers "that challenge the billings, rates and related practices of the carrier." See Opp. Brief at 6 n.4. Thus Sprint asserts that Sections 201, 202, and 203 of the Communications Act preempt plaintiff's state law causes of action for fraud, negligent misrepresentation, and violation of the New Jersey Consumer Fraud Act. n3

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n3 ?Section 201 of the Communications Act requires that "all charges, practices, classifications, and regulations for and in connection with [interstate] communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful." 47 U.S.C. 6 201(b).

Section 202 makes it unlawful for a common carrier to "make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services. . . . " 47 U.S.C. § 202(a).

Section 203 requires that every common carrier "file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers.

Discussing this doctrine, the Third Circuit notes that "The well-pleaded complaint rule [*438] is alive and well and a plaintiff 'may [in most instances] avoid federal jurisdiction by exclusive reliance on state law."' Railway Labor Executives Ass'n v. Pittsburgh & Lake Erie R.R. Co., 858 F.2d 936, 942 (3d Cir. 1988). Further, in the case of an alleged "actual conflict" in which the court must determine whether state causes of action are preempted by federal law, the state courts are competent to make that determination and "must be permitted to [do so] in cases brought before them." Id. Nonetheless, with respect to state law actions removed to federal court, there remains a "very limited area in which a federal court . . . is authorized to recharacterize what purports to be a state law claim as a claim arising under a federal statute." Id. at 941-41.

The Third Circuit has adopted *a two-pronged test to determine whether a removed state law action falls within this "limited area" of complete federal preemption. District courts should first address whether the allegedly preemptive statute contains civil enforcement provisions under which the plaintiffs state claims could [**13] be brought. Id. at 942 (citing Franchise Tax Bd., 463 U.S. at 24). The inquiry "is not whether the federal law provides the same remedy available to the plaintiff under state law, but rather whether there is some vindication for the same interest." Id. at 942 n.2 (citations omitted). If the federal statute provides no provision for adjudication of the right plaintiff seeks to enforce, then no claim arises under federal law, and removal was improper. Id. at 942.

The second prong of the inquiry examines whether the federal statute contains a clear Congressional intention to permit removal of state claims despite the plaintiffs exclusive reliance on state law. Id. Absent an "affirmative indication" of Congress' intent to permit removal, complete preemption does not apply, and "the district court need not and should not address the issue of whether the state substantive law relied upon by the plaintiff has been preempted by federal law. That issue must be left for determination by the state court on remand." Id. In such a case, the state court would determine which law to apply based upon whether an actual conflict exists between state and federal law.

In accordance [**14] with this test, a comparison of the Communications Act's civil enforcement provision, 47 U.S.C. § 207, with the plaintiffs claims reveals that the interests plaintiff seeks to vindicate are not protected by the federal statute. n4 The language of the statute provides a remedy for suits alleging violations of the Act, including Sections 201, 202, and 203, as Sprint argues. However, Weinberg does not claim that Sprint breached its statutory duty to act in a just and reasonable manner, and he does not allege violations of Sections 201, 202, or 203. The suit does not challenge Sprint's provision of services or its tariff rates, nor does it dispute the calculation of those rates, n5 Instead, plaintiffs state law claims relate to Sprint's advertising practices. Sections 201, 202, and 203 of the Communications Act impose no duty on common carriers to make accurate and authentic representations in their promotional practices, and, therefore, Section 207 provides no remedy for a deviation from such conduct. See Boyle v. MTV Networks. Inc., 766 F. SUDD. 809, 816 (N.D. Cal. 1991). Accordingly, the Court finds that the Act's civil enforcement provision does not provide a remedy through [**15] which a customer may [*439] recover for a common carrier's failure to disclose a billing practice. n6 See In re Long Distance Telecommunications Litiq., 831 F.2d 627, 633 (6th Cir. 1987) (Communications Act did not preempt state common law claims of fraud and deceit based on alleged failure of telephone companies to disclose practice of charging for uncompleted calls).

n4 The Communications Act's jurisdictional provision provides that

any person claiming to be damages by any common carrier subject to the provisions of the chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

47 U.S.C. § 207.

n5 For this reason, the Court declines to address Sprint's argument that the "filed rate doctrine" requires the exercise of federal jurisdiction over this action. The "filed rate doctrine" insulates from judicial challenge the rate filed by common carriers with the FCC and prohibits courts from awarding relief that would impose upon a carrier any rate other than that filed with the FCC. See MCI Telecommunications Corp. v. Graphnet, 881 F. Supp. 126. 132 (D.N.J. 19951, As discussed supra, plaintiff's suit does not challenge Sprint's published tariff rates. [**16]

n6 It is worth restating that this case does not challenge the billing practice itself, but the failure to disclose the practice. Sprint argues for the "uniform application of federal law" by stating in its opposition papers that "there is no reason why Sprint's using one-minute minimum billing increments should be judged using New Jersey law." See Opp. Brief at 9. Sprint, however, mischarachterizes plaintiff's claims by referring to the adjudication of its utilization of one-minute billing increments. Plaintiff's complaint seeks damages for having been fraudulently induced to enroll in Sprint's long distance program because of Sprint's failure to disclose its utilization of that practice in its promotions. Clearly Congress as evidenced an intent to achieve a uniform telecommunications system through the application of federal law to the standards of services provided by common carriers. See MCI Telecommunications, 71F.3d at 1094. The Court, however, is unable to locate any indication of a Congressional intent to apply federal law uniformly to challenges to a common carrier's advertising and promotional practices.

Claims involving the quality of Sprint's services, the reasonableness of its rates, or the lawfulness of the rates would clearly be preempted by the Act. For instance, in Ivy
Broadcasting Co. v. AT&T, 391 F.2d 486 (2d Cir. 1968), the complaint alleged negligence and breach of contract in the provision of interstate telephone service. The Second Circuit held that the claims were preempted by federal common law, despite the fact that they did not allege violations of specific portions of the Communications Act. Because the torts involved the level of service provided by the defendants and because of a Congressional intent to require uniformity and equality in the service and rates provided by communications companies, the court held that state law could not apply.

This action, however, involves an alleged failure to disclose to customers the practice of "rounding up" and relates specifically to statements made in Sprint's advertising promotions. The conduct at issue is neither regulated by the Communications Act nor dependent upon Sprint's status as a regulated long distance carrier. The Court therefore finds that it lacks the authority to recharacterize plaintiff's claims as [**18] exclusively federal because the Communications Act does not contain a civil enforcement provision "within the scope of which the plaintiff's state claim[s] fall[]." See Railway Labor Executives Ass'n, 858 F.2d at 942.

The Court further finds no evidence that Congress specifically intended to permit removal of purely state law claims by completely preempting this field. Defendants have not pointed to, nor has the Court located, any language in the Communications Act establishing an "affirmative indication" of Congress' intent to make state law claims for fraud, misrepresentation, and violation of a state consumer protection statute removable to federal court. See id.; KVHP TV Partners, Ltd. v. Channel 12.874 F. Supp. 756, 761 (E.D. Tex.

1995); Boyle, 766 F. Supp. at 816.

To the contrary, *Congress expressly created a "savings clause" in the Act, which states that

nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

47 U.S.C. § 414. This "savings clause" expressly preserves causes of action for breaches of duties [**19] that do not exist under the Act. See MCI Telecommunications v. Garden State Investment Corp., 981 F.2d 385, 387 (8th Cir. 1992) (citing Comtronics, Inc.v. Puerto Rico Tele. Co., 553 F.2d 701, 708 n.6 (1st Cir. 1977)); KVHP TV Partners, Ltd., 874 F. Supp. at 759. Further, the inclusion of such a clause appears to be inconsistent with a Congressional intent to completely preempt state law claims not addressed through the Act. Long Distance Telecommunications Litig., 831 F.2d at 634; n7 KVHP TV Partners, [*440] Ltd., 874 F. Supp. at 761; Cooperative Comm., Inc. v. AT&T, 867 F. Supp. 1511, 1515 (D. Utah 1994); Financial Planning Inst. v. AT&T, 788 F. Supp. 75, 77 (D. Mass. 1992). Inclusion of the savings clause "clearly indicates Congress' intent that independent state law causes of action . . . not be subsumed by the Act, but remain as separate causes of action." Cooperative Comm., Inc., 876 F. Supp. at 1515.

n7 The Sixth Circuit in the Long Distance Telecommunications Litigation case compared the Communications Act's savings clause to the clause contained in the Aviation Act, 49 <u>U.S.C. §</u> 1506, which is nearly identical. The court noted that in <u>Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 48 L. Ed. 2d 643, 96 S. Ct. 1978 (1976), the Supreme Court held the Aviation Act's savings clause to be not "labsolutely inconsistent" with a common law action for misrepresentation. Long Distance Telecommunications Litig., 831 F.2d at 634 (quoting 426 U.S. at 300).</u>

As such, the Court finds that the savings clause preserves Weinberg's state law claims against Sprint as independent from and not arising under the Communications Act. The state law causes of action prohibit conduct distinct from that regulated by the Communications Act, and the duties Sprint is alleged to have breached are separate from those owed under the Act. See Long Distance Telecommunications Litig., 831 F.2d at 633; see also KVHPTV Partners, Ltd. v. Channel 12, 874 F. SUDD. 756, 761-62 (E.D. Tex. 19951 (federal Communications Act did not completely preempt state law claims for tortious interference, civil conspiracy, and violation of Texas Deceptive Trace Practices Act); American Inmate Phone Systems, Inc. v. US Sprint Communications Co., 787 F. Supp. 852, 856 (N.D. Ill. 1992) (Communications Act did not completely preempt claims for violation of Illinois Consumer Fraud and Deceptive Business Practices Act); Boyle, 766 F. Supp. at 816 (Communications Act did not completely preempt claims for violation of California Business and Professions Code) Bruss Co. v. Allnet Communication Services, Inc., 606 F. SUDD. 401, 411 (N.D. III, 1985) (Communications Act [**21] did not completely preempt claims for violation of Illinois Consumer Fraud and Deceptive Business Practices Act). Accordingly, the claims in this case may not be "recharacterized" as claims arising under the Communications Act. See Railway-Labor Executives Ass'n, 858 F.2d at 942.

The Court therefore finds that this action was removed without federal question jurisdiction for three reasons: 1) the causes of action set forth in plaintiffs complaint do not "arise

under" federal law; 2) a defense of preemption may not be a basis for removal; and 3) the action does not fall within the doctrine of complete preemption. Accordingly, the Court must address Sprint's alternative argument that 28 U.S.C. § 1332 provides a basis for federal jurisdiction over this action.

B. Diversity of Citizenship

+Subjection matter jurisdiction based upon diversity of citizenship is proper only in civil actions between citizens of different states "where the amount in controversy exceeds the sum or value of \$50,000.00, exclusive of interest and costs." 28 U.S.C. § 1332(a). Section 1332 requires complete diversity of citizenship between all plaintiffs and all defendants. Development Fin. Corp. [**22] v. Alpha Hous, & Health Care, Inc., 54 F.3d 156, 158 (3d Cir. 1995). in a class action, however, citizenship need only be diverse between the named class representatives and the defendants. In re School Asbestos Litiq.. 921 F.2d 1310, 1317 (3d Cir. 1990), cert. denied sub nom, U.S. Gypsum Co. v. Barnwell Sch. Dist. No. 45, 499 U.S. 976, 111 S. Ct. 1623 (1991).

As an initial matter, the Court notes that this case has, to date, not been certified as a class faction. Despite the absence of certification, the Court will nonetheless apply class action principles, as this circuit holds that a suit should be treated as such for purposes of determining federal jurisdiction whether or not the class has been certified. See Spellman, 1995 U.S. App. LEXIS 37149, 1995 WL 764548 at *7 (3d Cir. 1995); Packard v. Provident Nat'l Bank, 994 F.2d 1039, 1043 n.2 (3d Cir.), cert. denied sub nom, Upp v. Mellon Bank, N.A. 126 L. Ed. 2d 373, 114 S. Ct. 440 (1993); Garcia v. General Motors Coro., 910 F. Supp. 160, 164 (D.N.J. 1995).

Here, it is undisputed that diversity of citizenship exists between named plaintiff Weinberg and defendant Sprint, and the dispute arises concerning the satisfaction of Section 1332's amount in controversy requirement. [**23] In a case involving removal, the [*441] removing defendant bears the burden of demonstrating that the statutory requirements of diversity jurisdiction have been met. Spellman, 1995 U.S. ADD. LEXIS 37149, 1995 WL 764548 at *8; Columbia Gas Transmission Corp. v. Tarbuck, 62 F.3d 538, 541 (3d Cir. 1995). The removal statute should be applied stringently, and all doubts should be resolved in favor of remand. Boyer v. Snap-On Tools, Corp., 913 F.2d 108, 111 (3d Cir. 1990), cert. denied, 498 U.S. 1085, 112 L. Ed. 2d 1046, 111 S. Ct. 959 (1991). This will result in the continuation of the "tradition of reading the diversity statute narrowly so as not to frustrate Congress' purpose in keeping the diversity caseload of the federal courts under some modicum of control." Spellman, 1995 U.S. App. LEXIS 37149, 1995 WL 764548 at *10 (citations omitted).

It is well settled that each plaintiff in a class action must independently satisfy the statutory "amount in controversy" requirement. See Zahn v. International Paper Co.. 4.14 U.S. 291, 30.1-02, 38 L. Ed...2d 511, 94 S. Ct. 505 (1973); In re Corestates Trust Fee Litig., 39 F.3d 61, 64 (3d Cir. 1994); Packard, 994 F.2d at 1045. Accordingly, as the removing party, Sprint must demonstrate that each member of the putative class alleges an amount in [**24] controversy greater than \$ 50,000. In the case of a removing defendant asserting federal jurisdiction, the Third Circuit places "great confidence in the allegations of the plaintiff's complaint" because of the presumption that "the plaintiff has not claimed an excessive amount in order to obtain federal jurisdiction." Spellman, 1995 U.S. ADD. LEXIS 37149, 1995 WL 764548 at *8. Thus to determine whether Sprint has met its burden, the Court must look to the allegations contained in the complaint itself. Angus v. Shiley. Inc., 989 F.2d 142, 145 (3d Cir. 1993).

Plaintiff's Complaint seek an unspecified amount of damages including "compensatory damages in an amount to be determined at trial." *When determining whether the jurisdictional amount as been satisfied in such a case, the district court must make "an

independent inquiry into the value of the claims alleged" in order to determine whether plaintiffs complaint states a claim that meets the jurisdictional amount. <u>Garcia</u>, 910 F. <u>Supp.</u> at 165 (citing Anqus, 989 F.2d at 146). This inquiry should be guided by "a reasonable reading of the value of the rights being litigated." <u>Angus</u>, 989 F.2d at 146 (citations omitted).

Sprint contends that the **[**25]** \$ 50,000 requirement has been met with respect to at least one member of the putative plaintiff class, which includes all residential customers of Sprint. In its opposition to plaintiff's motion to remand, Sprint states that it has "identified from its computerized records at least three Sprint residential customers (and therefore, members of the putative class) whose long distance usage" in the relevant period has exceeded \$ 50,000. Accordingly, Sprint argues, the amount in controversy requirement has been satisfied with respect to these plaintiffs.

The Court, however, disagrees with Sprint's analysis. An inquiry into the "value of the rights being litigated" should focus not on the total long distance usage of Sprint's customers, but rather on the portion of the total charges that resulted from Sprint's alleged fraud and misrepresentation--the amount representing the difference between 10 cents and the actually charged for each minute billed. In making this inquiry, the Court finds that the amount of actual compensatory damages recoverable in this suit could not reach \$ 50,000 any plaintiff.

The Complaint also seeks an unspecified amount of punitive damages. When a plaintiff [**26] seeks recovery of both actual and punitive damages and such damages are legally recoverable, courts may take into account the claim for punitive damages when determining whether the jurisdictional amount has been satisfied. Bell Preferred Life Assur. Soc'y, 320 U.S. 238, 240, 88 L. Ed. 15, 64 S. Ct. 5 (1943); Packard, 994 F.2d at 1046. However, courts must scrutinize carefully a claim in which a request for punitive damages comprises the majority of the jurisdictional amount, see Packard, 994 F.2d at 1046, for exorbitant punitive damages should not be cause for the transformation of a state action into a federal one. Neff v. [*442] General Motors Corp., 163 F.R.D. 478, 483 (E.D. Pa. 1995).

Plaintiff Weinberg seeks punitive damages for common-law fraud and negligent misrepresentation. Further, Weinberg states a claim under 7 the New Jersey Consumer Fraud statute, which provides for awards of treble damages

in any action under this section the court shall, In addition to any other appropriate legal or equitable relief, award threefold the damages sustained by any person in interest. In all action under this section the court shall also award reasonable attorneys' fees, filing fees and reasonable [**27] costs of suit.

N.J.S.A. 56:8-19. Under the statute, if a plaintiff proves that the defendant engaged in a practice that both violates the Act and has resulted in a loss, an award of both treble damages and attorneys' fees is mandatory. If plaintiff is unable to prove an ascertainable loss resulting from the unlawful practice, only attorneys' fees may be recovered. See Cox v. Sears Roebuck & Co. 138 N.J. 2, 24, 647 A.2d 454 (1994). Also, 'iwhen provided for under state law, attorneys' fees must be considered in the determination of the jurisdictional amount in controversy. Missouri State Life Ins. Co. v. Jones, 290 U.S. 199, 202, 78 L. Ed. 267, 54 S. Ct. 133 (1933).

Relying on decisions from the Fifth and Eleventh Circuits, Sprint argues that the Court should aggregate the claims for punitive and treble damages among the putative class members in determining whether the jurisdictional requirement has been met. Sprint also seeks to avoid

requiring each class member to individually satisfy the jurisdictional amount by urging the Court to characterize the potential award of punitive damages as a "common fund" in which the putative plaintiffs would have "a common and undivided interest."

This circuit has not yet **[**28]** addressed the question of whether punitive damage claims in a class action may be aggregated to meet the jurisdictional threshold. The Third Circuit, however, recently held that an award of attorneys' fees may not be aggregated in a class action: "the attorneys' fees of each individual plaintiff combined with the other elements of the prayer for relief'must exceed the statutory minimum." <u>Spellman, 1995 U.S. App. LEXIS</u> 37149, at *9-10.

Rather than follow the decisions relied upon by Sprint, the Court will join other district courts in this circuit in finding that it would be "illogical" to permit the aggregation of punitive damage awards while requiring each class member to independently satisfy the jurisdictional amount with respect to compensatory damages. Garcia, 910 F. Supp. at 166; Hamel v. Allstate Indemnity Co., 1996 U.S. Dist. LEXIS 2685, 1996 WL 106120 at *2 (E.D. Pa. 1996) ("The distribution of punitive damages across the class of claimants is consistent with the principal . . . that each class member must individually meet the jurisdictional threshold."); Pierson v. Source Perrier, S.A., 848 F. Supp. 1186, 1189 (E.D. Pa. 1994). To accept Sprint's position "would undermine the purpose and intent of Congress in [**29] providing that plaintiffs in diversity cases must present claims in excess of the specified jurisdictional amount." Garcia, 910 F. Sudd. at 166 (quoting Zahn, 414 U.S. at 301).

Sprint's "common fund" argument is similarly unpersuasive. This is not a case in which plaintiffs seek to enforce a joint or common interest. The common fund exception would apply only if class members sued jointly "to enforce a common title or right in which they have a common and undivided interest." Packard, 994 F.2d at 1050. In this case, each plaintiff "was injured individually, and in a unique amount that in theory must be proved separately." Id. See Pierson, 848 F. Supp. at 1189; Hamel, 1996 U.S. Dist. LEXIS 2685, 1996 WL 106120 at *2. Accordingly, the Court will not aggregate the putative class members' claims for punitive damages in its consideration of the amount in controversy.

Examining the putative plaintiffs' claims for punitive damages individually, the Court finds it highly unlikely that each member of the class could recover an award sufficient to raise his or her total damage award to \$50,000. One way in which a court may make this determination is to divide an estimate of the total award of punitive [**30] damages [*443] by the number of potential plaintiffs in the class. See <u>Garcia</u>, 910 F. Supp. at 166; <u>Hamel</u>, 1996 U.S. Dist. LEXIS 2685, 1996 WL 106120 at *3.

In this case, the size of the class is as yet undetermined. Plaintiff states that the class consists of "many thousands of members," and Sprint contends that the class "appears to include millions of persons." A class consisting of one million Sprint residential customers would require a total damage award of at least \$ 50,000,000,000 in order to meet the jurisdictional threshold. Similarly, with a class of three million plaintiffs, an award of no less than \$ 150,000,000,000 would be necessary for each plaintiff to receive a \$ 50,000 award.

If, for example, the putative plaintiffs were to receive an average award of \$ 40,000 in compensatory damages and treble damages and costs, then each punitive damage award must reach \$ 10,000, In order for each plaintiff in a class of three million to receive \$ 10,000 in punitive damages, Sprint must sustain a total punitive award of \$ 30,000,000,000. Sprint has not met its burden of demonstrating to any certainty that such an award would be made. Instead, contemplating awards of compensatory damages, punitive damages, [**31] and treble damages and costs under the New Jersey Consumer Fraud Act, the Court finds it to be extremely unlikely that "the value of the rights being litigated" by each plaintiff would reach the \$ 50,000 minimum for federal jurisdiction.

Plaintiff also seeks an injunction enjoining Sprint from engaging in the alleged wrongful conduct. Sprint urges the Court to determine the amount in controversy by estimating Sprint's cost of complying with an injunction. By this measure, Sprint argues, the amount in controversy will surely exceed \$ 50,000, and jurisdiction will be established.

The Court declines to adopt such reasoning. The Third Circuit holds that in injunctive actions, "the amount in controversy is measured by the value of the right sought to be protected by the equitable relief." In re Corestates Trust Fee Litiq., 39 F.3d at 65. It is, therefore, "the value to plaintiff to conduct his business or personal affairs free from the activity sought to be enjoined that is the yardstick for measuring the amount in controversy." Id. (quoting 14A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure, § 3708 at 143-44 (2d ed. 1985)). The Court will not venture "through [**32] the looking glass to evaluate [plaintiffs'] claims from the defendant's perspective," Spellman, 1995 U.S. App. LEXIS 37149, 1995 WL 764548 at *9, and, accordingly, Sprint's argument fails. Plaintiffs' prayers for injunctive relief, taken alone or when combined with their claims for damages, do not suffice to bring the amount in controversy to the \$ 50,000 threshold.

Sprint has not met its burden of demonstrating that the putative class members' individual damage awards will reach the statutory jurisdictional minimum, n8 and accordingly, the Court finds that diversity of citizenship jurisdiction pursuant to 28 U.S.C. § 1332 does not exist. Because it finds no basis for federal subject matter jurisdiction, the Court is compelled to remand this action to New Jersey Superior Court.

n8 Sprint further argues that once it is determined that one plaintiff's damages exceed \$ 50,000, the Court may exercise supplemental jurisdiction over the remainder of the putative class members' claims, pursuant to 28 U.S.C. § 1367. Section 1367 provides for supplemental jurisdiction over non-federal claims that fall within the same case or controversy over which a federal court has original jurisdiction. See 28 U.S.C. § 1367(a). In making this argument, Sprint relies on In re Abbott Laboratories, Inc., 51 F.3d 524 (5th Cir. 1995), in which the Fifth Circuit held that Section 1367 supersedes Zahn's requirement that each plaintiff in the class independently satisfy the amount in controversy requirement and therefore permits a district court to exercise jurisdiction over members of a class who do not allege \$ 50,000 in damages.

This position, however, depends entirely upon a finding that at least one plaintiff satisfies the jurisdictional amount. Because the Court finds that none of the plaintiffs' claims of compensatory and punitive damages meet the \$ 50,000 requirement, see infra, the Court need not and will not reach the issue. See Spellman, 1995 U.S. App. LEXIS 37149, 1995 WL 764548 at *8 & n.22; Packard, 994 F.2d at 1045-46 & n.9,

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II. MOTION TO STAY

Having found that original federal jurisdiction does not exist and that this case is **[*444]** appropriate for remand to New Jersey Superior Court, the Court need not address Sprint's additional motion to stay the proceeding pending resolution of its motion before the IPML. The Court will therefore deny Sprint's motion as moot.

CONCLUSION

For the reasons set forth herein, the Court finds this case to be lacking federal jurisdiction and, therefore, grants plaintiff Weinberg's motion to remand. The Court also denies **as** moot Sprint's motion to stay.